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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-438

IRVING D. LIPKOWITZ and LEE J. GOLDWATER, Executors of the Estate of LEO J. GOLDWATER, Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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Respondent's memorandum in opposition contains several misstatements of fact and erroneous conclusions of law to which this brief is addressed.

1. At page 3 of his memorandum in opposition, respondent mistakenly describes the New York declaratory judgment obtained by Gertrude B. Goldwater ("Gertrude") as the judgment of an "intermediate appellate court." On the contrary, the only involvement of an appellate court in Gertrude's declaratory judgment action was in the context of the appeal of Leo J. Goldwater ("Leo") from an order of the lower court which had granted Gertrude's motion for a preliminary injunction restraining Leo from remarrying during the pendency of the action. The Appellate Division denied Gertrude's motion for preliminary injunction

and dismissed the cause of action alleged in her complaint for a permanent injunction.[1] The appellate court freed Leo to remarry but it never reviewed Gertrude's subsequent declaratory judgment.

2. At page 6 of his memorandum in opposition, respondent argues that there was no need to join Leo's second wife, Lee, as a party to Gertrude's declaratory judgment action, since Leo had not yet even married Lee. In fact, Leo married Lee in December 1958, two months before Gertrude obtained her declaratory judgment. For all of the reasons set forth in the petition, Lee was an indispensible party to that action under New York law and the court was powerless to bind the parties to any judgment rendered in her absence.

3. There is a clear conflict between the decision in this case and *Estate of Borax* v. *Commissioner*, 349 F. 2d 666 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966), which this court ought to resolve to settle the very important estate tax question here involved. While conceding that the rule of validation adopted by the Second Circuit in *Borax* "might arguably conflict with the Commissioner's position sustained in this case" (memorandum in opposition, p. 4), respondent erroneously states that *Borax* "limited its holding to the alimony provisions of the Code" (p. 5), although he does acknowledge by footnote that the case also involved joint income tax returns and dependency exemptions.[2]

Even if the alimony issue were distinguishable from the present issue, which we maintain it is not, it seems pre-

[1] See the Tax Court opinion, reproduced as Appendix B to the petition for a writ of certiorari, which correctly summarizes the applicable legal proceedings at pp. 13a—14a.

[2] But for the Commissioner's allowance of a full marital deduction for amounts passing to the second spouse, the estate tax marital deduction issue would presumably have been raised in *Borax* as well.

posterous that a man and woman should be treated as spouses to file joint income tax returns but that the survivor of the two should be denied the status of surviving spouse for federal estate tax purposes. If there is a reason for different treatment, it has not been advanced by the Commissioner either in the proceedings in the Tax Court, in the Court of Appeals or in opposition to the instant petition.

4. There is no basis for respondent's statement that adoption of petitioners' position would produce the anomaly of a decedent having more than one "surviving spouse" (p. 5). Under petitioners' position, Leo's Mexican divorce from Gertrude would be valid for estate tax purposes and his only surviving spouse would be Lee.

5. *United States* v. *Davis*, 370 U.S. 65 (1962) and *Farid-Es-Sultaneh* v. *Commissioner*, 160 F. 2d 812 (2d Cir. 1947), cited by respondent, are not applicable here. Those cases involved the question of whether a prenuptial transfer might be considered a gift under the gift tax laws, but at the same time a transfer for a valuable consideration under the income tax laws. The courts had little difficulty in determining that this apparent anomaly was possible, since the transaction was taxable as a gift in the first instance "merely because of the special provisions in the gift tax statute defining and restricting consideration for gift tax purposes." *Farid-Es-Sultaneh* v. *Commissioner*, *supra*, at 814. The decision that the unusual restrictions in the gift tax laws should not be imported into the income tax laws is entirely inapplicable here. Indeed, as we point out in the petition (pp. 6-8), the legislative history to the marital deduction provisions of the estate tax laws makes it abundantly clear that Congress intended that all provisions of all tax laws dealing with marital status be construed on a uniform basis.

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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